



 UNIVERSITY OF TORONTO
FACULTY OF LAW

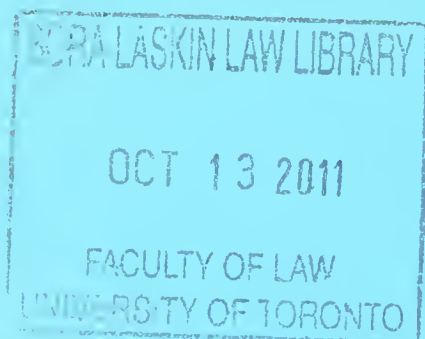
CLASS ACTIONS: CASES AND MATERIALS

2011

Volume 2

Garry D. Watson
Emeritus Professor
Osgoode Hall Law School
York University, Toronto

KE
8402
.W38
2011a
v.2
c.1



Chapter 5: Certification by Type of Case: Product Liability, Misrepresentation, and Systemic Negligence

PART 1 – INTRODUCTION AND OVERVIEW 408

Introductory Note	408
-------------------------	-----

PART 2 – PRODUCT LIABILITY..... 411

Introductory Note	411
-------------------------	-----

<i>Andersen v. St. Jude Medical Inc.</i>	411
--	-----

<i>Caputo v. Imperial Tobacco Ltd.</i>	414
--	-----

Notes and Questions	415
---------------------------	-----

1. Lack of Commonality in Caputo	415
--	-----

2. More on Caputo	415
-------------------------	-----

3. Canadian Tobacco Litigation	417
--------------------------------------	-----

4. “Copycat” actions	417
----------------------------	-----

5. Mass Tort Class Actions in the U.S.	419
---	-----

6. The US – Inventory Litigation as an alternative to Class Actions	424
---	-----

7. Mass tort class actions – Canada and the US compared.	425
---	-----

8. General absence of inventory litigation in Canada.....	427
---	-----

9. Mass tort class actions in US state courts and the passage of the Class Action Fairness Act	428
--	-----

10. Issues classes – Certifying the common issues and leaving individual issues for individual proceedings	431
--	-----

11. Reframing a Product Liability Case as a Constructive Trust Case -- <i>Serhan v. Johnson & Johnson</i> : the birth of “waiver of tort” in class actions.....	431
---	-----

12. Will Waiver of Tort have legs, and what will be its scope?	434
--	-----

13. Some questions arising from <i>Serhan</i>	441
---	-----

14. The Future of “Constructive Trust” Class Actions	441
--	-----

15. Pre-emption of Claims in the United States – the reshaping of medical device and pharmaceutical products liability in the US?.....	442
--	-----

16. Supreme Court Inc.	444
-----------------------------	-----

17. Class actions and regulators	444
--	-----

18. A theoretical perspective on class action adjudication.....	446
---	-----

PART 3 – MISREPRESENTATION: THE PROBLEM OF “RELIANCE” (AND COMMON ISSUES)..... 450

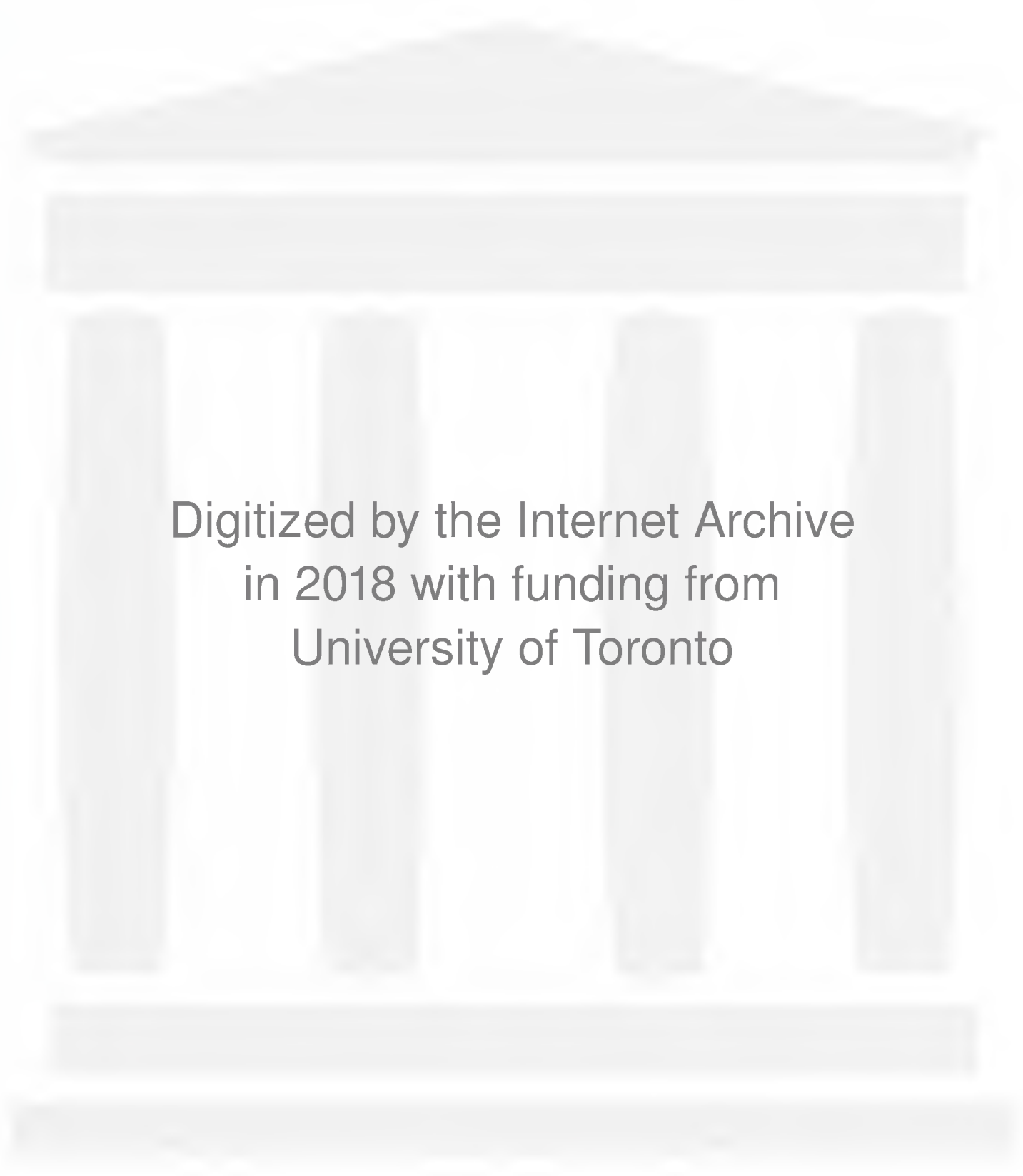
<i>Williams v. Mutual Life Assurance Co.</i>	451
--	-----

<i>Zicherman v. Equitable Life Insurance Co. of Canada (appeal by Kumar)</i>	451
--	-----

Notes and Questions	453
---------------------------	-----

1. The interplay of systemic negligence and reliance.....	453
---	-----

2. A Different Approach to Avoiding the Reliance Issue	453
3. Nonetheless, the strategy introduced in <i>Collette</i> is not bulletproof.....	454
4. Privity of contract and statutory warranties	455
5. Class Actions and Privity Problems, by Jacob Ziegel.....	456
PART 4 – SYSTEMIC NEGLIGENCE.....	459
Introductory Note	459
<i>Egglestone v. Barker</i>	461
Notes and Questions	462
1. Note on <i>Egglestone</i>	462
2. Can <i>Collette</i> and <i>Williams/Zicherman</i> be reconciled?	463
3. “Systemic Liability” as a common issue.....	463
Unpaid Overtime Class Actions	466
<i>Fresco v. Canadian Imperial Bank of Commerce</i>	466
1. <i>Fresco</i> explained	467
2. Aggregate Assessment in <i>Fresco</i>	469
<i>Fulawka v. Bank of Nova Scotia</i>	469
Notes and Questions	471
1. Reconciling <i>Fulawka</i> and <i>Fresco</i>	471
<i>Fresco v. Canadian Imperial Bank of Commerce – (Divisional Court)</i>	472
2. The Question of Damages	474
3. The Future of Overtime Pay Actions	476
4. KPMG: overtime class action	476



Digitized by the Internet Archive
in 2018 with funding from
University of Toronto

